Supreme Court, U. S.
FILED
NOV 3 1977
MICHAEL RODAK, JR., CLERK

No. 77-554

In the Supreme Court

of the United States

OCTOBER TERM, 1977

GLOBE LININGS, INC., HOWARD D. WEBB and ARTHUR M. LOCKHART,

Petitioners,

v.

CITY OF CORVALLIS,

Respondent-Defendant and Third-Party Plaintiff-Appellee,

v.

S & T CONSTRUCTION COMPANY, INC.,

Respondent-Third-Party Defendant and Fourth-Party Plaintiff-Appellee,

v.

THE FIRESTONE TIRE & RUBBER CO.,

Respondent-Fourth-Party Defendant-Appellee.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The petition should be denied.

1. Petitioners' patent was determined by the District Court to be invalid and unenforceable for obviousness (Pet. 6), and the Court of Appeals affirmed

that decision. In this Court, petitioner claims only that those courts erred in the construction of 35 U.S.C. § 103 (Pet. 9, 16), which raises no question of due process and does not support the exercise of this Court's supervisory jurisdiction. *Corrigan* v. *Buckley*, (1926) 271 U.S. 323, 332; *United States* v. *Kordel*, (1970) 397 U.S. 1, 11.

2. The applicable level of skill in the prior art is that of a person "reasonably skilled" in the art, *Graham* v. *John Deere Co.*, (1966) 383 U.S. 1, 37; the Court of Appeals correctly determined the level of the prior art in this case when it held that Feild and Allen disclosed the "main significant elements" of Claim 5 and the use of inside floats from which water would run into the sump (Pet. 34). The engineering testimony established beyond question that Feild and Allen eliminated any novelty from Dial (Tr. 237-270).

3. The Army report (Pet. 13) did not show nonobviousness. The Army reservoir cover was designed for use on petroleum storage tanks, where the specific gravity of water caused it to accumulate on the surface and seek a lower level than the fuel. Petitioner's "invention" was not intended to solve the Army's problem (see Ex. 43 at pp. 125-126; Tr. 304-306, 308-309).

4. Petitioner does not complain of the court's requirement that the invention produce a synergistic result, but contends that the use of inner floats produced such a result (Pet. 15). A similar device is found in Allen, and the excess cover material and peripheral sump are found in both Feild and Allen.

Petitioner's contention that the Court of Appeals misconceived the elements of a synergistic result disregards its case in that court, where petitioner urged vigorously that its invention produced an "unusual and surprising result" (Br. 20-21; Reply Br. 15-16). The fact is that Dial added nothing to the prior art; if it is not identical with Feild and Allen,

> ". . . the mere existence of differences between the prior art and an invention does not establish the invention's nonobviousness." *Dann* v. *Johnston*, (1976) 425 U.S. 219, 230.

5. In *Kamei-Autokomfort* v. *Eurasian Automotove Products*, (9th Cir. 1977) 553 F.2d 603, cert. pdg., the Court of Appeals reversed a finding of the district court that there was a synergistic result; in this case it approved the district court's finding that there was none (Pet. 26-27, 34), and that two-court finding cannot be questioned in this Court. *Graver Mfg. Co.* v. *Linde Co.*, (1949) 336 U.S. 271, 275, adhered to on reh. (1950) 339 U.S. 605, reh. den. (1950) 340 U.S. 845.

CONCLUSION

The petition is not substantial on the merits and suggests nothing of sufficient importance to command the attention of this Court. It should be denied.

Respectfully submitted,

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The Firestone Tire & Rubber Co.

November 2, 1977